79-1227

Supreme Court, U. S.
FILED
FEB 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

ARCHIE PELTZMAN,

Petitioner,

v.

AMERICAN RADIO ASSOCIATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ARCHIE PELTZMAN
Petitioner,Pro Se,
2483 W.16th St,
Brooklyn,N.Y.11214

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction.....	2
Questions Presented.....	3
Relevant Constitutional & Statutory Provisions.....	4
Statement of the Case.....	5
Reasons for Granting the Writ....	10
1. The Decision Below Conflicts With The Decision of Other Courts of Appeals as To The Duty of Fair Representation Owed to a Member of The Bargaining Unit.....	10
2. The Decision Below Conflicts With The Decisions of Other Courts of Appeals As to The Granting of Summary Judgement, Without a Hearing, Without an Answer to The Complaint, Without Discovery & Without Oral Argument, Seveenteen Months After Respondent Filed The Motion.....	22

Page

3. The Decision Below Conflicts With The Statutory Analysis Previously Developed By This Court, And Sanctions An Unconstitutional Application Of The National Labor Policy.. 27
& Maritime Law

Conclusion..... 37

Appendix A (District Court Memorandum Order) Broderick J..... A1

Appendix B (District Court Order Dismissing Complaint..... A 16

Appendix C (Court Of Appeaps Order Affirming District Court Decision...A 17

Appendex D (Court of Appeals Order Denying Petition For Rehearing.... A 19

CASES CITED

Barabas et al v. Prudential Lines Inc; 451 F. Supp. 765, 1978; affnd 577 F2d 184 (2d Cir. 1978)..... 33

Bazarte v. United Transportation Union;429 F2d868,(3rd Cir. 1970).. 21

Beriault v.Local 40, Super Cargoes & Checkers, of I.L,&W.U. 501 F2d 258, (9th Cir. 1974)..... 21

Boilermakers Local 749 v. National Labor Relations Board, 466 F2d 343, (C.A.D.C., 1972)..... 30

CASES CITED

Page

Booster Lodge No. 405 v. National Labor Relations Board, 412 US 84, 1973..... 30

Cannon v. Consolidated Freightways Corp; 524 F2d 290, &7th Cir. 1975)..... 21

Commonwealth v. Local 542 I.U.O.E. U.S. District Court E.D. Pa, 18 F.E.P. 1563, 1979..... 36

De Arroya v. Sindicato de Trabajadores Packinhouse AFL-Cio, 425 F2d 281 (1st Cir. 1970)..... 21

Federal Maritime Commission et al v. Pacific Maritime Association et al 55 led 2d 96, 1978..... 35

Griffin v. International Union United Automobile Aerospace & Agricultural Implement Workers of America, UAW, 469 F2d 181 (4th Cir. 1972)..... 21

Hines v. Anchor Motor Freight, Inc. 424 U.S. 554, 1976.....10,11,12

Jensen v. Farrell Lines Inc, 87 L.C. nr.11, 577 SDNY 1979, no.79-1372.... 30

Jaroslawicz v. Seedman, 528 F2d 727 (2d Cir. 1975)..... 10,22

Jones v. Trans World Airlines Inc. 495 F2d 790, (2d Cir. 1974).... 10,13,21

Mennis v. International Union, United Automobil, Aerospace & Agricultural Implement Workers of America, UAW, 531 F2d 850 (8th Cir. 1975)..... 21

CASES CITED

	Page
National Labor Relations Board v. Textile Workers, 409 US 213, 1972.....	30
N.L.R.B. v. American Radio Assn. 82 N.L.R.B. 1344, no.151 Docket nr. 21791 2d Cir. 1950.....	33
NLRB v. American Radio Assn; (Pacific Maritime Assn) Jack Hajim, 117 NLRB no. 151.....	33
NLRB v. (Pacific Maritime Assn.) (Radio Officers Assn), (American Radio Assn) 89 NLRB no. 115, 1950.....	33
NLRB v Alaska S.S. Co. et al (American Radio Assn) 221 F2d 357, 1954.....	33
NLRB v. Alaska S,S. Co. et al (American Radio Assn) 245 F2 222.....	33
NLRB v. Mountain Pacific, 270 F2d 425, 1959.....	25
NLRB v. Gottfried Baking Co., 215 F2d 772 (2d Cir. 1954.....	13
NLRB v. Swinerlon, 202 F2d 511, 1958 den 346 US814.....	14
NLRB v. United Brotherhood of Carpenters & Joiners, 202 F2d 516,CA9, 1953).....	14

CASES CITED

	Page
NLRB v. American Radio Assn. Docket nr. 24737 (2d Cir. 1957) not listed in NLRB volumes.....	33
Peltzman v. Central Gulf Lines Inc. 497 F2d 332 (2d Cir. 1974..	8
Pacific Maritime Association v. NLRB, 452 F2d 8 (9th Cir. 1971..	14
Radio Officers Union v. National Relations Board, 347 US 17, 1954.	29
Red Star Express v. NLRB, 196 F2d 78 (2d Cir. 1950.....	15
Seafarers International Unions Atlantic, Gulf, Lakes, & Inland Waters District, AFL-CIO (American Barge Lines & Marvin W. Meyers et al) 1979, 244 NLRB no. 99.....	31
Tedford v. Peabody Coal Co., 533 F2d 952 (5th Cir. 1976.....	21
Vaca v. Sipes, 386 US 171,1967..	27,29
Whitten v. Anchor Motor Freight Inc., 521 F2d 1335 (6th Cir 1975).	21

STATUTES

Title 28, U.S. Code Sec 1254 (1).	3
National Labor Relations Act.....	14

Statutes

	Page
Landrum-Griffin Act., Bill of Rights, Pub. L. 86-257, Title 1 Sec 101, Sept 14, 1959, 73 Stat. 522	4
U.S. Constitution	3
First Amendment	3
Sec. 15, Shipping Act of 1916, 46 USC; Sec 814	35

Miscellaneous

Rule 56, Rules of Federal Civil Procedure	23,27
Union Security Clause	18
Vacation Clause	17
Univ. of Chicago L.R. 37-778, 1970 "Closed Shop Union By-Laws under the NLRA	34
38 ALR 2d 413, 954, Legality of Hiring Hall arrangements under LMRA	18
Rutgers-Camden Law Journal Vo. 5-418, 1974. "A Clarification of the types of union security agreementsaffirmatively permitted by Federal statutes." Prof. Haggard..	20
Clearinghouse Review, May, 1978 p. 13, "The Application & Meaning of the duty of Fair Representation: Representing the wrongfully discharged worker." Steven Savner	21

MISCELLANEOUS

	Page
"Union Discipline & Member Dissendence"; Prof. Wellington's article in "Union Power & Public Policy," edited by David B. Lipsky, 1973	15
IALR Fed 295, "Neccessity of hearing, & oral argument on motion for summary judgment or for judgment on the pleadings."	23,27

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. _____

Archie Peltzman,
Petitioner,

v.

American Radio Association
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Archie Peltzman respectfully prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herin on Nov. 13, 1979. A petition for rehearing was denied on Dec. 7, 1979.

OPINIONS BELOW

The District Court filed a memorandum order which appears as (App A at 1a). Petitioner has no knowledge of the memorandum being reported.

The District Court Judgment dismissing the complaint appears as (App B at 16a).

There was no opinion by the Court of Appeals which affirmed on the basis of the memorandum order of District Court, Broderick J, and appears as (App C at 17a).

The Court of Appeals order denying a petition for rehearing appears as (App D at 19a).

JURISDICTION

The judgment of the Court of Appeals was entered on Nov. 13, 1979. A petition for rehearing filed within the fourteen days time allowed was denied on Dec. 7, 1979.

This petition for certionari was filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1254 (1).

QUESTIONS PRESENTED

1. Does violation of a union's duty to bargain for, enforce, & administer a bargaining agreement for the benefit of all employees in the bargaining unit breach it's Duty of Dair Representation?

2. Does the statutory analysis previosly developed by this Court in reference to a union's Duty of Fair Representation call for the union to follow it's constitution, it's rules, & any violation of the union to enforce the agreement in "matters affecting employment" render the union liable for the breach of it's duty?

3. Does a seaman have a first amendment constitutional right to "join"

or refrain from "joining" a union of his choice in a subsidized United States Merchant Marine?

4. Does a gross violation of Rule 56 of Federal Rules of Civil Procedure invalidate a decision, & deprive petitioner of his constitutional right to a fair trial?

STATUTORY PROVISIONS INVOLVED

Bill of rights; constitution and bylaws of labor organizations.

...(5) Safeguards against improper disciplinary action. -- No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for non payment of dues by such organization or by any officer thereof unless such member has been, (A) served with written specific charge; (B) given a reasonable time to prepare his defense:

(C) afforded a full & fair hearing.

(b) Any provision of the constitution & bylaws of any labor organization which is inconsistent with the provision of this section shall be of no force or effect, Pub. L. 86-257, Title 1, Sec 101, Sept. 14, 1959, 73 Stat. 522.

STATEMENT OF THE CASE

The petitioner Archie Peltzman, a Merchant Marine Radio Officer, & former member of the appelle union American Radio Association instituted this suit in the United States District Court of New York on May 9, 1977, alleging a violation of the union's Duty of Fair Representation,

In essence, petitioner alleges that the union breached it's Duty of Fair Representation by negotiating, enforcing & administering various hiring

vacation, health & welfare & pension provisions of the bargaining agreement for the benefit of "union" members only, and discriminating against "permit cards" members like petitioner, in violation of the bargining agreement, & the union's constitution, by-laws, shipping assignment rules, & causing the employer to discharge petitioner in violation of the labor, maritime, & constitutional law, as interperted by this Court, & other Federal & State Courts.

Peltzman worked for two & one half years for various steamship companies on "temporary" positions, & was discharged from a "permanent' position after nine months on Aug. 30, 1971, Because the steamship company demanded a "clearance" from the union to reship petitioner after a vacation, & the union refused to issue such "clearance" to Peltzman, in violation of the union's

shipping rules which mandated a return to the ship after a vacation, *(JA22)

(d) Radio Officers & Radio Electronics Officers on passenger ships shall have the right after six (6) months of continuous employment to have a special leave of absence , granted of one trip off with no pay. Such special leave shall not be considered as a break in service for any purpose.

The union moved to dismiss Peltzman's complaint by filing a summary judgment motion on June 30, 1977.

On November 2, 1978, seventeen months later, the District Court granted the union's motion, Quote... Defendant is entitled to judgment according to law under Rule 56 on all issues other than that regarding the non-payment of pension benefits. So ordered Broderick, J. (App. A at 14 a)

In the memorandum accompanying the order the District Court held that

* JA 22 refers to Joint Appendix in the Court of Appeals.

Peltzman's claims of illegal hiring hall procedures, & closed shop allegations, & constitutional violations had been ruled on adversely by J. Knapp, & the C ourt of Appeals,& is barred by collateral estoppell citing Peltzman v. Central Gulf Lines Inc., 497 F2d 332 (2d Cir 1974) reversing & remanding on other grounds, No. 73-2911 (SDNY Jan. 11, 1974). (App. A at 13a)

The District Court also cited J. Knapp's determination that Central Gulf's requirement that Peltzman become a union member was valid, & therefore the agreement between American Radio Association & Central Gulf which provided that employees would not be discriminated against due to non-membership in the union, was not a breach of the clause because the agreement states that this non discrimination clause, is to have no effect on the union's security clause. "Since

Peltzman was discharged in accordance with the union security clause, there is no breach of the non-discrimination provision" (App. A at 12 a)

On Dec. 12, 1978, the union filed another summary judgment motion to dismiss the complaint. Judgment was granted on April 4, 1979, (app B at 16 a).

On May 21, 1979, Peltzman filed an appeal to the United States Court of Appeals for the Second Circuit. On Nov. 13, 1979, the Court of Appeals affirmed the District Court's Judgment on the memorandum order of Judge Broderick, dated Nov. 2, 1978 & the memorandum endorsement of J. Broderick dated April 2, 1979, (App C at 17 a).

A petition for rehearing was denied on Dec. 7, 1979, (App D at 19 a).

REASONS FOR GRANTING THE Writ

1. The Decision Below Conflicts with The Decision of Other Courts Of Appeals As to The Duty Of Representation Owed To A Member Of The Bargaining Unit,

The Court of Appeals erred, petitioner submits in affirming a decision of the District Court which negates it's own decisions regarding summary judgment, (1) res judicata (2) & the Duty of Fair Representation (3).

This affirmance conflicts with other Circuit Courts & this Court's decision in Hines v. Anchor Motor Freight, Inc., 424 US 554, 1976.

---

1. Jaroslowicz v. Seedman, 528 F2d 727, (2d Cir 1975).
2. Mitchell v. National Broadcasting Company, 553 F2d 265, (2d Cir 1977).
3. Jones v. Trans World Airlines, 495 F2d 790,(2d C ir 1974).

In Hines this Court held the union breached it's Duty Of Fair Representation in its handling of the grievance.

Here it is undisputed that the union caused the discharge by conspiring with the employer to evade & negate the vacation, & stand-by assignment rule for an employee who had under the union rules, & bargaining agreement a "permanent" assignment, & a contract right to reship after a vacation.

Murphy v. Operating Engineers local 18, 99 LRRM 2074, U.S. District Court Ohio, no. C 73-1336, 1978, holds that breach of by-laws by the union & it's officers who disciplined dissident union member member in violation of terms & conditions of union by-laws have breached the contract with member.

It was also held that removal of member's referral card, was a violation of Duty of Fair Representation, & that such discrimination in respect of employment referrals is intentional, severe, unrelated to legitimate union objectives, & is offensive to the letter & spirit of the Act. The Court cites numerous D.F.R. cases such as Hines v. Anchor Motor Freight, 424 US 554, 1976, & says "In this regard a union may not in bad faith or with a dishonest purpose interfere with the employment rights of it's members as conferred by an applicable collective bargaining agreement."

The District Court erred when he held that "Since Peltzman was discharged in accordance with the union security clause there is no breach of the non-discrimination provision." (App A at 12a).

Petitioner argues that no authorities are cited for this conclusion except the Central Gulf Lines case, & petitioner argues that NLRB v. Gottfried Baking Co., 215 F2d 772, (2d Cir 1954) holds that a contract between a union, employer, & employer's association, provided that employees should employ only members of the union in good standing is a closed shop arrangement.

In Jones v. Trans World Airlines Inc., 495 F2 790 (2d Cir 1974), the Court held that union membership was not a proper ground for determing seniority. The union here used that ground for denying a "clearance" referral on the basis of non-membership, even though it is undisputed that petitioner paid dues, fees, & assessments for four years in the same amount as a regular member of the union.(JA 45,refers to index of petitioner's dues sheets in Central Gulf case second trial.)

Petitioner argues that the restrictive by-laws of a "clearance" referral assignment to a ship from an exclusive preferential hiring hall is tantamount to a closed shop & repugnant to the supremacy of National Labor Relations Act, & the Landrum-Griffin Act.

As a general rule a union unfair labor practice exists where an employer refuses to accept a job applicant, under a hiring hall arrangement, merely because he has been denied "clearance" by the contract union. Morris Knudsen Inc. v. NLRB 270 F2d 864, (CA9). Cases to the same effect are NLRB v. Swinerlon, 202 F2d 511, 1958, cert den. 346 US 814, & NLRB v.UNITED Brotherhood of Carpenters & Joiners, 202 F2d 516, (CA 9, 1953)

In Pacific Maritime Association V. NLRB, 452 F2d 8 (9th Cir. 1971), the Court was unwilling to minimize Morrison-Knudson vicarious liability holding.

In that case involving hiring hall discrimination against non-union workers, the Court found that an employer association knew or should have known of the discriminatory practices.

Prof. Wellington *cites the second circuit holding in Red Star Express v. NLRB, 196 F2d 78 (2d Cir. 1952) preferential hiring plans were not "saved" by clauses that noted their probability invalidity, since the average worker would not appreciate such legalisms, In declaring such a plan by it's own terms a nullity, an unfair labor practice, the second circuit explained:

> the existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the Contract

*Prof. Wellington's article in "Union Power & Public Policy" edited by David B. Lipsky, 1973, entitled "Union Discipline & Member Dissidence."

> by refusing to become a member of the union. It is no answer to say that the Act gives him a remedy in the event he is discharged. The Act requires that the employee shall have freedom of choice, & any interference with that choice is forbidden

The court concluded:

> ...The question is not only whether under principles of contract law, the addendum (to the effect that any clause in violation of Taft-Hartley would not be enforced) would contractually negative the illegal union-security clauses, but whether it would have the effect of preventing the coercion that would otherwise follow...

The bad faith, arbitrary action & invidious discrimination in the hiring hall "clearance" referral system was proved at the hearing before J. Knapp in the Central Gulf litigation, (2d trial), when Mr. Smith Sec'y Treasurer of the union testified that he used the leverage of the hiring hall to get petitioner off the ship. I quote transcript p,136:

Now in order to register he had to pay his dues & the fighting fund etc. That was a hiring hall fee or dues, as we call them, & he did so, but he still refused to pay the initiation fee. When he registered on the active list, a job came on the board, a permanent job, & it went down the list to Mr. Peltzman, the S.S. Green Ridge...
Therefore, when he came back eventually to the United States, to a port
where we had an office where we could handle it, Mr. Peltzman at that time had to pay his initiation fee or get off that vessel in accordance with our collective bargaining agreement between us & Central Gulf Steamship Co...
P. 137

He could have gotten off that vessel & got right in & registered Active Group 1, & we would have had to keep shipping him. Everytime he got on a vessel, we could eventually pull him off again but he could go ahead & register ad infinitum.

P. 135 (after petitioner left a temporary job as the union rules required.) And again we asked him for the initiation fee but we had no leverage at that time to get him off.

Petitioner argues that for any union to discriminate in the hiring referral system as between members & non-members

in relation to "permanent" jobs is a violation of the Labor Laws & tantamount to a closed shop. See Legality of Hiring Hall arrangements under LMRA, 38 ALR 2d 413, 1954, preference in hirings can't be given to union members.

Petitioner argues that the union security clause (JA 14) Sec. 4(b): "The company agrees, as a condition of employment, that all employees in the bargaining unit shall become & remain members of the union thirty (30) days after date of hiring," is unenforceable not only because plaintiff signed shipping articles for one year on three separate foreign voyages, & this clause could not be enforced against a seamen whose contract is the ships articles, & could only be discharged according to the bargaining agreement for "just cause." It also violates

petitioner's Sec. 7 rights to refrain from becoming a member.

In Soto v International Organization Of Masters,Mates,and Pilots of America, 343 N.Y.S. 2d 497,1973,N.Y. Civil Court held that seaman,who had registered for both port relief,and offshore work,and simultaneously applied for vacation,and who was a member in good standing,was entitled to damages,where the trustees of vacation pay benefit,and pension plan exceeded their authority under 1961 shipping rules,in determining that seaman was not eligible for port relief officer's work while on vacation,where exclusive power to amend rules was vested in union's international executive committee,and trustees were without authority to deny such port relief work,to which he would otherwise have been entitled, and seaman was entitled to damages therefor.

Petitioner argues that the vacation clause (JA 22) mandates a return to the S.S. Green Ridge after a vacation,and the stand-by assignment rule also mandates a return to the ship.

In "A clarification of the types of union-security agreements affirmatively permitted by federal statutes" *Prof. Haggard quotes Senator Taft p.44"If he pays the dues without joining the union he has a right to be employed." Legislative History LMRA at 1422.

Petitioner argues that he had a written agreement bargained for in his behalf that protected him against discharge without "just cause",without charges or a hearing,and this was violated by the invidious,arbitrary

---

*Rutgers-Camden Law Journal Vo.5-418,1974.

and discriminatory acts of the union in disregarding it's own By-Laws protecting petitioner. Murphy v Operating Engineers (supra).

*Nine circuit Courts have held that proof of arbitrary conduct is sufficient to prove a violation of the Duty of Fair Representation.

*See e.g. De Arroya v Sindicato de trabajadores Packinhouse; AFL-CIO, 425 F2 281, (1st Cir. 1970); Jones v. Trans World Airlines; Inc., 495 F2d 281,(2nd Cir. 1974). Bazarte v. United Transportation Union; 429 F2d 868 (3rd Cir 1970). Griffin v. International Union, United Automobile; Aerospace & Agricultural Implement Workers of America, UAW, 469 F2d 181 (4th Cir. 1972); Tedford v. Peabody Coal Co., 533 F2d 952 5th Cir. 1976). Whitten v. Anchor Motor Freight, Inc; 521 F2d 1335 (6th Cir. 1975); Cannon v. Consolidated Freightways Corp; 524 F2d 290 (7th Cir 1975); Minnis v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, 531 F2d 850 (8th Cir. 1975); Beriault v. Local 40, Supra Cargoes & Check. of I,L.& W.U. 501 F2d 258 (9th Cir. 1974). (collected cases from Clearhouse Review May, 1978 p. 13. "The application & Meaning of the Duty of Fair Representation: Representing the wrongfully discharged Worker." Steven Savner.)

These cases which conflict with the unsupported second circuit's affirmation of the District Court's summary judgment decision justify the grant of certiorari to review the judgment below.

2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Granting Of Summary Judgment, Without A Hearing, Without an Answer To The Complaint. Without Pre-Trial, Without Discovery, & Without Oral Argument, Seventeen Months After The Union Filed The Motion.

The second circuit's own leading summary judgment decision Jaroslawicz v. Seedman, 528 F2d 727, (2d Cir, 1975) holds that to be successful on a Rule 56 application, it must be established that there are no geniune issues of material fact. The responsibility of the District Judge on a motion is

merely to determine whether there are issues to be tried other than to try the issues himself via affidavits.

The annotation 1 ALR Fed 295- "Neccessity of hearing, & oral argument on motion for summary judgment or for judgment on the pleadings" collects the cases which conflict with the District Judge's decision & the unsupported affirmation of the second circuit.

Petitioner argued in his pleadings that there were seriously disputed issues of fact as to the fair representation, duties & responsibilities of the union towards the plaintiff in its operation of the exclusive hiring hall.

Petitioner filed an index of ninety pages (JA 43-52) of the documents filed in opposition to the union's summary judgment motion with excerpts of some documents, but in reading the District Judge's memorandum order these ninety documents are not mentioned. (App A at 1-16 a)

Petitioner copies verbatim Quotes from (JA 47-48) "Congressional Hearings on Bill to Legalize Maritime Hiring Halls" (not passed) 1950 (Ex 18), p. 70- (Senator Humphrey comments on hiring hall practice) Quote: "Is it not true that there is a type of private policing that goes on to make sure that despite the law, sub rosa --."

Mr. Ostrin - Things are going on p.76- Senator Taft, Quote: "It is perfectly legal to run a hiring hall under the law, if they run it right, if they don't discriminate."

See following statement of Senator Taft p.77 re Governor Gruening who said it was the union control though the hiring halls which absoloutely prevented & wrecked shipping to Alaska...

p. 91 - * Statement of Mr. Howe - Secretary Treasurer of Radio Officers Union.

Mr. Howe "I have been so busy running a closed shop hiring hall trying to man ships that are carrying cargo to Korea & other parts of the world, that I did not have time to prepare a written statement as I would like to have done." Senator Humphrey - "Did I understand you to say that you were busy running a closed-shop union hiring hall?"

Mr. Howe - "Running a closed-shop union hiring hall. All of the Maritime unions

*Mr. Howe is same official who charged American Radio with unfair practices in NLRB. In docket no. 24737, which NLRB sealed testimony, & Smith (union official) also denies knowledge of case.
See other union officials statements of determination to continue discriminatory hiring hall practice, p.62, 81-82,87, 184,198,199,213,215. (not excerptd herein) but cited in NLRB V. Mountain Pacific, p. 431, 270 F2d 425, 1959

that I know of are running a closed-shop union hiring hall today." p.93 -

Senator Taft - "It makes no difference whether the employer wants this man or that man, you demand the right to tell him whether he takes him is, that what you want?"

Mr. Howe- "We say when a man joins the union---"

Senator Taft - "That is the power you are asking for."

Mr. Howe - "We say that when a man joins the union & agrees to live by its by-laws & rules, & he has no right to go to the head of the line & get his money order ahead of the other men."

Senator Taft - "In other words, you say the employer has no right to select the man he thinks is better because the union says "No you can't take that man, you have to take this man." That is the power you want. That is the power you are demanding here.

You are above the law, you are above the Government. You are above employers wishes, you are above the competency of the man. You insist that any employer must take this man because the union says so, is that right? Is that the power you are asking for?"

Petitioner argues that his constitutional rights to a fair trial were denied when the District Court, & the Court of Appeals both ignored his pleadings below.

This gross violation of the Federal Rules of Civil Procedure as documented in cases collected in 1ALR Fed 295, provides yet another reason for the grant of certiorari to review the decision below.

3. The Decision Below Conflicts With The Statutory Analysis Previously Developed By This Court, And, Sanctions An Unconstitutional Application Of The National Labor Policy, & The National Maritime Policy.

Vaca v. Sipes 386 US 171, 1967, holds

that a union breaches its duty of Fair Representation when it takes action towards members of the collective bargaining unit lacking "complete good faith & honesty: & by invidious treatment...in matters affecting their (such member's) employment"

The District Court in it's memorandum order held the legality of Peltzman's removal from his job, "was later upheld by the National Labor Relations Board, & the Federal Courts, the union did not abuse its discretion by deciding not to process Mr. Peltzman's claim predicated on the removal as a grievance under its collecting bargaining agreement." (App A at 8 a)

The District Court is in error because the National Labor Relations Board never made any decision in this case. The General Counsel of the National Labor Relations Board refused

to issue a complaint, & Vaca holds that...in matters affecting their (such members) employment, it cannot fairly be implied that Congress intended exclusive jurisdiction to lie with the NLRB" Vaca v. Sipes 386 US 171 (1967) at pages 177, 179.

The District Court says (App A 10 a) "Thus Peltzman free to serve in as many temporary posts as he liked without joining the union. Far from waving the fee, American was not legally entitled to insist upon the fee so long as Peltzman remained in temporary jobs. Once Peltzman was given permanent work, American consistently demanded that he pay & become a union member."

The District Court is in error because it has been abundantly settled since Radio Officers Union v. National Labor Relations Board, 347 US 17, (1954),

that a union may not compel membership. cf. also National Labor Relations Board v. Textile Workers, 409 US 213, (1972)., Booster Lodge No. 405 v. National Labor Relations Board, 412 US 84 (1973),and innumerable cases in the Courts of Appeals, some of which are listed in Boilermakers Local 749 v. National Labor Board, 466 F2^{d} 343 (C.A.D.C,, 1972)

Petitioner argues that the Maritime industry is a subsidized industry & government priniciples of due process & constitutional rights are involved. There are Maritime laws involved requiring signing of shipping articles specifying voyage length & destination, government licenses, & when a union causes a discharge it must observe all the protection that due process requires. See Jensen v. Farrell Lines

Lines Inc. 87 LC nr. 11, 577 SDNY 1979) no. 79-1372, wherein District Court Judge Sweet held that government action was involved in a claim by maritime supervisory officers who challenged:

> maritime industry's practice of engaging in pre-hire collective bargaining contracts under which a shipowner & unions would enter into an exclusive representation agreement covering supervisory employees before any ships were actually built or any men hired, the requisite government action was involved to permit these employees to claim a first amendment right to freedom of Association. Congress has recognized that the merchant marine carries out a specific governmental function of vital interest to the national defense. The employer is a heavily subsided private firm which had it's decision making power greatly circumscribed by a extensive governmental regulatory scheme & is subject to continued oversight.

A recent case Seafarers International Unions Atlantic, Gulf Lakes, & Inland Waters District, AFL-CIO, (American Barge Lines, & Marvin W. Myers et al)

1979, 244 NLRB, no. 99 is exactly in point with petitioner's case

The Board held that:

> a union maintained an unlawful hiring hall agreement with a group of employers, where among other things referrals were made according to seniority grade and, individuals seeking to upgrade their seniority ratings were requested to join the union at the time they sought a grade increase; without being told that they did not have to join the union in order to obtain job referrals. (emphasis supplied)

Petitioner argues that both J. Broderick, & J. Knapp held contrary to the above decision that permament jobs are only available to members of the union. (App A at 10 a).

The Nlrb found after reviewing the facts & the record as a whole,

> from the foregoing & the record as a whole, we conclude that respondent's hiring hall procedures in fact cause signatory employers to discriminate unlawfully with respect to hires and illegally prefer union members over non-union members in violation of Sec. 8b 1a & 2 of Act. (emphasis supplied)

Petitioner in his pleadings below listed *six cases of this union's pattern & practice of discriminating in hire, tenure & seniority, which are in effect & operation exactly similar to the Seafarer's case.

In Barabas et al v. Prudential Lines Inc, 451 F Supp 765, 1978, the American Radio Assn. sued for an injunction on behalf of nineteen Radio Officers when Prudential decided to sell its ships.

*NLRB v. American Radio Assn., 82 NLRB 1344 no. 151, Docket nr. 21791, (2d Cir. 1959); NLRB v. American Radio Assn., Docket nr. 24737 (2d Cir.1957) not listed in NLRB volumes; NLRB v. American Radio Assn., (Pacific Maritime Assn., Jack Hajim, 117 NLRB no.151; NLRB v. Pacific Maritime Assn. (Radio Officers Assn);(American Radio Assn.); 89 NLRB no. 115, 1950 NLRB v. Alaska S.S. Co. et al (American Radio Assn.); 221 F2d 357, 1954; NLRB v. Alaska S.S. Co., et al (American Radio Assn); 245 F 2d 222.

Injunction was denied & the second circuit affirmed, 577 F2d 184 (2d Cir. 1978) J. Cannella, District Judge below, held that none of the parties in that suit came into court with clean hands.

Plaintiff argues that notwithstanding this long history of violation of the Nation Labor Relations Act & the Landrum-Griffin Act, J. Broderick held that the hiring hall procedure is not a closed shop, but offers no authorities to sustain his holding. (App A at 12a). See Closed Shop Union By-Laws under the N.L.R.A., Univ. of Chicago , L.R., Vo. 37-778, 1970, where the author collects the cases, & argues that closed shop contracts which prescribe union membership as a condition of initial & continued employment were rendered illegal in 1947. Red Star Express Lines Inc. v. NLRB 196 F2d 78 (2d Cir. 1952). The author concludes that

Closed shop by-laws which serve no legitimate interest of members, affect basic statutory rights of non-members who are entitled to fair representation, & reluctance to interfere with internal union affairs is not an excuse for allowing unions to use their constitutions to legitimize efforts to implement discriminatory practices that are repugnant to the basic values of NLRA.

Petitioner argues that the Bill of Rights of Members of Labor Organizations prohibits such illegal by-laws. He has alleged in his pleadings that the bargaining agreement was required to be filed with the Federal Maritime Commision for it's approval or disapproval according to the requirements of the Shipping Act. This was not done & would void the agreement. See Federal Maritime Commission et. al,V. Pacific Maritime Association

55 led 2d 96, 1978; which holds that collective bargaining agreements challenged as anti-competitive, are not categorically exempt from the filing requirements of Sec. 15 of the Shipping Act of 1916, 46 USC Sec. 814.

See Commonwealth v. Local 542 I.W.O.E., U.S. District Court E.D. Pa 18 F.E.P. 1563. 1979, a recent case which collects the cases in pattern & practice of unions in discrimination in the operation of exclusive hiring halls, & seniority systems.

The grant of the petition to review the decision below is therefore justified & necessitated by the overwhelming evidence of illegality in the exclusive hiring hall referral system of this union.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and affirmance of the second circuit.

Respectfully submitted,

Archie Peltzman

Archie Peltzman Pro Se

Jan. 21, 1980

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARCHIE PELTZMAN, PLAINTIFF, -against- AMERICAN RADIO ASSOCIATION, Defendant.	77 Civ. 2247 (VLB) MEMORANDUM ORDER

VINCENT L. BRODERICK, U.S.D.J.

1

Archie Peltzman, plaintiff pro se, instituted this suit seeking damages and injunctive relief, raising a variety of claims against defendant American Radio Association ("American").[1] Plaintiff seeks wages for six years, pension and welfare benefits, vacation benefits, and reinstatement without loss of seniority. Jurisdiction over plaintiff's claims exists pursuant to 28 U.S.C. Sections 1331 and 1333, 29 U.S.C. Section 185 and principles of pendent and ancillary Jurisdiction.

Defendant moves for summary judgment pursuant to Rule 56 of the Federal Rules of Cival Procedure, raising the affirmative defenses of res judicata and collateral estoppel. Sefendant's motion is granted in part and denied in part.

11

From 1943 to 1949, plaintiff Archie Peltzman was a radio officer in the merchant marine and a member of the American Communications Association, predecessor of the defendant American Radio Association. In 1949 The Coast Guart refused to reissue plaintiff's radio operator's license on the grounds that he was either a communist or a communist sympathizer. Without a license plaintiff was unable to practice his trade. Eighteen years later, he brought suit against the Coast Guard for recovery of his license and for damages. The Coast Guard agreed out of court to grant plaintiff's long-denied license.[2]

Peltzman once again sought work as a merchant marine radio Operator. He applied to the American hiring hall which supplied laborers, both union members and non-members, to

to various employers. American furnished Peltzman with a permit card which qualified him to serve in temporary positions only, and informed him that, under the provisions of the collective bargaining agreements, to become eligible for a permanent post he would have to pay an initiation fee and join the union. The initiation fee was $2,000. Peltzman objected to paying the fee. He argued that he had been a member of the union at the time of his involuntary removal from the industry in 1949 and that on his return to work his old membership should be deemed to continue. The union disagreed, contending that Peltzman had failed to pay dues for 18 years and that under the union's constitution his membership had automatically expired.

While the dispute was still unsettled, and after Peltzman had worked at several temporary jobs, he was assigned to permanent duty on the S.S. Green Ridge, owned by Central. The union demanded that plaintiff pay the fee but plaintiff resisted, After

several trips on the S.S. Green Ridge, Plaintiff asked for the customary vacation leave of one trip off, which was granted. Before he left the ship, he was given a written notice by his employer warning that he would not be reemployed in his permanent position unless he obtained clearance from the union. During Peltzman's vacation, the union again requested that he pay the initiation fee and he once again declined. Plaintiff was told not to report for duty and the position on the S.S. Green Ridge was filled by another.

Peltzman then began what has developed into a long series of efforts to regain his job without paying the $2,000 initiation fee. He protested to American and to Central. This failing, he petitioned the Regional Director of the National Labor Relations Board ("NLRB") to issue a complaint which the Regional Direcor refused to do. On appeal, the General Counsel of the NLRB upheld the Regional Director's determination. Plaintiff then appealed to the second Circuit which dismissed the appeal from the bench.

Peltzman v.N.L.R.B., No.72-1091 (2d Cir.), cert. denied, 409 U.S. 887 (1972).

Peltzman lodged an action against the present defendant in the New York Supreme Court, which was dismissed for lack of jurisdiction. Peltzman v. American Radio Association, 69 Misc. 2d 17, 327 N.Y.S. 2d 505 (S. Ct. N.Y. Co.) aff'd, 335 N.Y.S. 2d 998 (1st Dept. 1972). cert. denied, 411 U.S. 916, reh. denied, 411 U.S. 977 (1973).

Mr. Peltzman next instituted suit against Central before Judge Knapp in federal district court, raising most of the claims which are asserted again in this action. Central moved for summary judgment, which was granted. Peltzman v. Central Gulf Lines, Inc. No.73-2911 (S.D.N.Y. Jan. 7, 1974). The Second Circuit reversed and remanded with instructions that evidence be taken on the issue of whether Peltzman had been the subject of discriminatory action by the union. Peltzman v. Central Gulf Lines, Inc. 497 F 2d 332 (2d Cir. 1974). After conducting evidentiary hearings, Judge Knapp found that all others similarly

situated had been required to pay the initiation fee and again granted summary judgment. Peltzman v. Central Gulf Lines, Inc., No. 73-2911 (S.D.N.Y. Dec. 10, 1974) aff'd, 523 F 2d 96 (2d Cir. 1975), cert. denied, 423 U.S. 1074 reh. denied, 424 U.S. 979 (1976). Peltzman filed a motion for relief from the judgment under Rule 60(b) (3) of the Federal Rules of Civil Procedure, charging that the defendant's witnesses had lied during the hearings. The motion was denied in the district court and the court of appeals affirmed and imposed defendant's costs of appeal upon plaintiff.

Contemporaneously with filing the instant suit against American in federal court, Peltzman also filed an action against American in the Civil Court of the City of New York for restitution of all assessments and dues paid to the union while working as a non-member. He lost in the Civil Court and the Appellate Term of the Supreme Court and his applications for leave to appeal were denied.

Plaintiff's complaint, affidavit and memorandum are rambling and often unclear. Thus his claim that the union

committed a breach of its fiduciary duty to him by accepting his dues and assessments and not providing him with pension benefits is vague and unspecific and might be dismissed were it prepared by a lawyer. Howerer, pro se complaints are to be treated by the standard announced in Haimes v. Kerner 404 U.S. 519, 520-1 (1972):

> ...(A)llegations such as those ass by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in in support of his claim which would entitile him to relief." Conley v. Gibson, 355 U.S. 139 F.2d 774 (CA 2 1944). See Dioguardi v.Durning139 F 2d 774 (CA 2 1944)

Plaintiff's claim meets this test.

Summary judgment is a drastic measure and is to be applied only when it is clear that there is no genuine material issue of fact present. The burden to establish the absence of material issues of fact is on the movant. First National Bank of Cincinnati v. Pepper, 454 F. 2d 626, 629 (2d Cir. 1972) Defendant has failed to meet that burden on the quest-

ion of pension benefits--American's affidavits do no adequately discuss the subject--and summary judgment on that issue is denied.[3]

Plaintiff alleges that American did not pursue his claim according to to the grievance procedures specified in the collective bargaining agreement with Central. This claim rests on a misinterpretation of American's role. A union's refusal to process a grievance may not be arbitrary, discriminatory or in bad faith, but the union is under no absolute duty to process every grievance raised by its members. Vaca v. Sipes, 386 U.S. 171 (1967). Here, where the union itself instigated the removal of Mr. Peltzman from his job, and the legality of that removal was later upheld by the National Labor Relations Board and the federal courts, the union did not abuse its discretion by deciding not to process Mr. Peltzman's claim predicated on that removal as a grievance under its collect-bargaining agreement.

Plaintiff alleges that Central did not follow the clause of the contract

which provided that at the time of termination of employment employees would be given a statment of the reason for discharge and that if such a statement were not given, it would be presumed that the discharge was without just cause. The employer, Central, is not a defendant herein. Perhaps plaintiff intended to charge that defendant had a duty to protest the omission of the statement. If so, he is in error. As noted above, American did not have a duty to process every grievance. Plaintiff was given notice by his employer before he left the ship that he would be discharged if he did not obtain union clearance.The reason for his dismissal was known to him.The lack of a statement of the cause of a firing creates at most only a presumption that the firing was without just cause.That presumption,if it ever existed in this case,was rebutted in the proceedings before Judge Knapp.The union owed no duty to plaintiff with respect to this claim.

Peltzman alleges that Central committed a breach of the section of the

collective bargaining agreement which required that seamen be rehired after vacation leave.Again,Central is not the defendant herein. If Peltzman means to claim that American should have pursued his grievance in regard to Central's refusal to rehire him,that claim has been already dealt with.

Plaintiff's claim that the union security clause was waived cannot stand. He does not attempt to claim that this waiver was explicit. It was implicitly waived,according to Peltzman,because he sailed off and on for several years without paying the initiation fee. Judge Knapp determined that the initiation fee was only required of those in permanent positions. No.73 Civ.2911 (S.D.N.Y. Dec. 10,1974),aff'd,523 F.2d 96 (2d Cir.1975), cert. denied,423 U.S. 1074 (1976), reh. denied,424 U.S. 979(1976). Thus Peltzman was free to serve in as many temporary posts as he liked without joining the union.Far from waiving the fee, American was not legally entitled to insist upon the fee so long as Peltzman remained in temporary jobs. Once Peltzman was given permanent work,American consistently demanded that he pay and become a union member.

Peltzman's contention that the "union security clause is a yellow dog agreement outlawed by the Norris-Laguardia Act" is without merit.[4] A "yellow dog contract"is an agreement between the employer and the employee in which the employee agrees not to join a union and is subject to dismissal if he does. The union-security clause was part of the collective bargaining agreement between the employer and the union: the clause provided that all permanent employees had to become union members. It bears no relation to a "yellow dog contract."

Plaintiff alleges that the union security clause is opposed to the policy of free association of the Norris-LaGuardia Act. He is wrong. The union security clause requires employees to join the union only after 30 days of employment and thus is specifically allowed by 29 U.S. C. Section 158 (a) (3).

Peltzman claims that American committed a breach of the clause of the contract between American and Central which provided that employees would not be discriminated against due to non-membership in the union, This clause specifically states, however, that it

is to have no effect on the union security clause. Since Peltzman was discharged in accordance with the union security clause there is no breach of the nodiscrimination provision.

Peltzman charges that American committed a breach of its duty of fair representation by conspiring with Central to force him to join the union. As previously determined by Judge Knapp, Central's requirement that plaintiff become a union member was valid. Peltzman v. Central Gulf Lines,Inc.,No. 73-2911 (S.D.N.Y. Dec.10,1974),aff'd, 523 F.2d 96 (2d Cir.1975), cert. denied, 423 U.S. 1074, reh. denied,424 U.S. 979 (1976). This being so,any "conspiracy" to achieve that end was also valid.

Mr Peltzman asserts that the hiring hall procedure provided for in the collective bargaining agreement constitutes an illegal closed shop,and that the hiring hall procedure is unconstitutional. The short answers to these claims are a) that the hiring hall procedure allows seamen to work for 30 days without joining a union and simply does not constitute a closed shop; and b) that the claim of unconstitutionality has

already been ruled upon adversely by Judge Knapp and the Court of Appeals and is barred by collateral estoppel. Peltzman v. Central Gulf Lines,Inc., 497 F.2d 332, 334 (2d Cir. 1974), rev'g and remanding on other grounds,No.73-2911 (S.D.N.Y. Jan 11, 1974).

Plaintiff cites 46 U.S.C. 599(a) as barring demands for payments to provide seamen with employment. Plaintiff is mistaken if he is alleging that the hiring hall procedure and union security clause require such a prohibited payment. The hiring hall operates on the dues of union members and the fees of non-members. These payments are made to maintain the hiring hall. They are a prerequisite for securing work only in that they qualify the seaman to gain the benefits of the hiring hall services. Such payments are permissable.

Finally, Peltzman raises the curious claim that "nothing in maritime law ... requires a "clearance" from a union for permission to reship a seaman who leaves the ship for a vacation". Plaintiff's complaint par.14. While this may be true it is not germane. Central demanded a clearance from the union pursuant to

the union security clause, not because of any mandate of maritime law.

Defendant is entitled to judgment according to law under Rule 56 on all issues other than that regarding the non-payment of pension benefits.

SO ORDERED.

s/ Vincent L.Broderick
Vincent L.Broderick,U.S.D.J.

Dated: New York,New York
November 2,1978

FOOTNOTES

!. Specifically,plaintiff contends that the union breached its fiduciary duty by improperly denying him pension and welfare benefits; that the union breached the provision of the collective bargaining agreement between it and his employer, Central Gulf Lines Incorporated,Inc. ("Central") concerning the processing of grievances; that the provision of the agreement concerning discharge procedures was breached; that the provision requiring seamen to be rehired after vacation leave was breached; that the union security clause was waived; that the union security is a yellow dog agreement and thus outlawed by the Norris-LaGuardia Act; that the union security clause is opposed to the policy of free association of the Norris-LaGuardia Act; that the union violated the provision of the agreement which specified that there should be no discrimination in hiring due to membership or non -membershio in the union;that

the union breached its duty of fair representation by conspiring with Central to force plaintiff to join the union; that the provision of the agreement concerning an exclusive hiring hall established an illegal closed shop and violates the plaintiff's constitutional right to contract with different shipping companies; that the maritime law protects plaintiff against demands for payment to obtain work; and that nothing in maritime law requires a seaman to obtain clearance for reshipping following vacation leave.

2. The Coast Guard did not settle on the question of damages, The Court dismissed Peltzman's claim for damages for the lack of subject matter jurisdiction since the government had not given its consent to be sued and was thus immune. Peltzman v. Smith, No.67 Civ. 392 (S.D.N.Y. March 20, 1968), affirmed, 404 F.2d 335 (2d Cir; 1968).

3. Defendant is free to renew its motion for summary judgment and present additional affidavits on the subject of this claim.

4. A yellow dog contract is not illegal; it is unenforceable. 29 U.S.C. Sec. 103.

APPENDIX B

A -16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARCHIE PELTZMAN

Plaintiff

-against-

AMERICAN RADIO ASSOCIATION

Defendant

77 Civ. 2247 (VLB)

JUDGMENT filed Apr 4 1979

Defendant having moved the Court for summary judgment, pursuant to Rule 56, of the Federal Rules of Civil Procedure, and the said motion having come on before the Honorable Vincent L. Broderick, United States District Judge, and the Court thereafter on April 2, 1979, having handed down its memorandum endorsement granting the said motion, it is,

ORDERED, ADJUDGED AND DECREED: THAT the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
April 4, 1979

s/ Raymond F Burghardt
Clerk

APPENDIX C
A-17

UNITED STATES COURT OF APPEALS
For The
Second Circuit

At a stated Term of the United States Circuit, held at the United States Courthouse in the City of New York, on the 13th day of November one thousand nine hundred and seventy-nine.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE WALTER R. MANSFIELD
Circuit Judges
HONORABLE JACOB MISHLER
Ch. District Judge

FILED Nov. 13, 1979

ARCHIE PELTZMAN,
Plaintiff-Appellant,

-against-

AMERICAN RADIO ASSOCIATION,
Defendant-Appellee.

79-7359

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by plaintiff-appellant pro se and by counsel for defendant-appellee.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFF_-IRMED ON the opinion of Judge Broderick, dated November 2, 1978, and the memorandum endorsement of Judge Broderick, dated April 2, 1979

s/ WILFRED FEINBERG
WILFRED FEINBERG

s/ WALTER R MANSFIELD
walter r. mansfield

Circuit Judges

s/ JACOB MISHLER
JACOB MISHLER, CH. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventh day December, one thousand nine hundred and seventy - nine

Present:
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
Circuit Judges

HON. JACOB MISHLER
District Judge

ARCHIE PELTZMAN	:	
Plaintiff-Appellant	:	79-7359 filed Dec.7,1979
v.	:	
AMERICAN RADIO ASSOCIATION	:	
Defendant-Appellee	:	

A petition for a rehearing having been filed herein by plaintiff appellant pro se.

Upon consideration therof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
A.Daniel Fusaro, Clerk